STATE OF MICHIGAN

DEPARTMENT OF ENERGY, LABOR AND ECONOMIC GROWTH

OFFICE OF FINANCIAL AND INSURANCE REGULATION

Before the Commissioner of Financial and Insurance Regulation

Maplewood Custom Millwork,
Petitioner

v

Case No. 07-690-WC

Secura Insurance Companies,
Respondent

_____/

Issued and entered
this 9th day of November 2009
by Ken Ross
Commissioner

FINAL DECISION

I
BACKGROUND

This case concerns a dispute between a business and its workers compensation insurer. Maplewood Custom Millwork appeals a decision by Secura Insurance to classify certain individuals as employees of Maplewood rather than as independent contractors. The consequence of Secura's decision is to significantly raise Maplewood's workers compensation insurance premium.

The appeal was filed by Maplewood pursuant to section 2458 of the Michigan Insurance Code, MCL 500.2458, which provides:

> . . . Every rating organization and every insurer which makes its own rates shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by his or her authorized representative, on his or her written request to review the manner in which the rating system has been applied in connection with the insurance afforded to him or her. If the rating organization or insurer fails to grant or reject the request

> within 30 days after it is made, the applicant may proceed in the same manner as if his or her application had been rejected. Any party affected by the action of the rating organization or insurer on request may, within 30 days after written notice of the action, appeal to the commissioner, who, after a hearing held upon not less than 10 days' written notice to the appellant and to the rating organization or insurer, may affirm or reverse the action. . . .

Following the hearing, the administrative law judge issued his Proposal for Decision. Maplewood filed exceptions to the PFD. Secura filed its response to these exceptions.

The PFD is well-grounded in facts in the record and its legal conclusions correctly apply applicable law. The PFD is adopted and incorporated into this Final Decision except as discussed below.

II
ISSUE

Section 2458 of the Insurance Code permits an insured to appeal to the Commissioner rate decisions made by its insurer:

> Any party affected by the action of the . . . insurer on request may . . . appeal to the commissioner, who . . . may affirm or reverse the action.

The issue is whether Secura correctly classified certain individuals who performed work for Maplewood as employees rather than independent contractors.

III
ANALYSIS

Maplewood was insured by Secura for the policy period June 14, 2004 to June 14, 2005. As is customary in workers compensation insurance, Secura set an initial estimated premium based on Mapelwood's stated number of employees and description of the types of work performed. At the conclusion of the policy period, Secura audited Maplewood's records to

establish the exact premium. If the individuals in question were independent contractors, Maplewood would not be responsible for providing workers compensation insurance covering those individuals. If they were not independent contractors, an injury to one of those individuals would subject Secura to a claim under Maplewood's workers compensation policy. The purpose of Secura's payroll audit was to determine if workers were properly classified in order to establish the appropriate insurance rates to be charged.

Based on its audit results, Secura concluded that Maplewood had failed to properly document its assertion that a significant number of its cabinet installers were independent contractors. As a result, Secura increased Maplewood's workers compensation premiums to $28,440.00 from the $6,636.00 premium estimate established at the beginning of the policy period.

The audit and rate adjustment provision of Maplewood's policy (Exhibit B) are provided below:

> **PART FIVE – PREMIUM**
>
> **A. Our manuals**
>
> All premium for this policy will be determined by our manuals or rules, rates, rating plans and classifications. . . .
>
> **B. Classifications**
>
> Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposure you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.
>
> **C. Remuneration**
>
> Premium for each work classification is determined by multiplying a rate times a premium basis. This premium basis includes payroll and

> all other remuneration paid or payable during the policy period for the services of:
>
> 1. all your officers and employees engaged in work covered by this policy; and
>
> 2. all other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.

At the beginning of the policy period, Maplewood reported to Secura that it had nine employees (PFD p. 14 and Exhibit 7) and 27 independent contractors (PFD p. 13 and Exhibit 3). The audit procedures are not in dispute and were described by the auditor, Ms. Sherrie Major (PFD pp. 17-19). Ms. Major testified that, in order to establish that the workers in questions were, in fact, independent contractors, Maplewood had to provide certificates of insurance for those individuals showing them to be independent contractors as well as independent contractor forms for those individuals. According to Ms. Major's uncontradicted testimony, Maplewood did not have the required documents. For that reason, the workers were classified as employees under the policy. (PFD p. 19) Maplewood's own witness, Mr. Dietrich, acknowledged that the documents had not been produced and that Maplewood's bookkeeper had made mistakes in classifying independent contractors, subcontractors, and employees. (PFD p. 16)

The PFD includes a discussion of two provisions of the Worker's Disability Compensation Act, Act 317 of 1969 (MCL 418.101, et seq.). The first provision, section 161 (MCL 418.161), defines "employee" as used in that Act. The second provision, section 171 (MCL 418.171), imposes workers compensation liability on employers who contract with

individuals who have not themselves complied with requirements of the workers compensation statute.

The ALJ concluded that Maplewood had the burden of establishing that the workers in question were independent contractors and had failed to meet that burden (PFD, page 22). The ALJ then stated that, even if Maplewood had met that burden, it still was still not free from liability under section 171 of the workers compensation act.

The Commissioner does not adopt that portion of the PFD which addresses the workers compensation statute. That discussion is not necessary to the resolution of this case, which can be resolved by applying the provisions of the Secura-Maplewood policy. Similarly, the exceptions of the parties which discuss the workers compensation act are also not relevant to the issue to be resolved by the Commissioner. The issue in this appeal is whether Petitioner provided Respondent with the documentation needed to establish that the workers in question were independent contractors. Even Petitioner admits that those documents were not provided. Without the documents, the insurer could not conclude that the individuals – who did perform work for Petitioner – were independent contractors.

IV
ORDER

Therefore, it is ORDERED that the action of Secura in setting Maplewood's workers compensation rates at $28,440.00 for the period June 14, 2004 to June 14, 2005 is affirmed.

Ken Ross
Commissioner

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

In the matter of	**Docket No.**	**2007-1674**
Maplewood Custom Millwork, **Petitioner**	**Agency No.**	**07-690-WC**
	Agency:	**Office of Financial and Insurance Regulation**
v **Secura Insurance Companies,** **Respondent** /	**Case Type:**	**Appeal** **Workers' Compensation**

Issued and entered
this 30 day of June, 2008
by Edward F. Rodgers II
Administrative Law Judge

PROPOSAL FOR DECISION

This matter commence with the filing of a Request for Hearing on December 20, 2007. Following the receipt of the Request for Hearing, the State Office of Administrative Hearings and Rules (SOAHR) issued a Notice of Hearing dated December 21, 2007. The Notice of Hearing scheduled a contested case hearing to commence on February 20, 2008.

The hearing commenced as scheduled on February 20, 2008. Ms. Katherine L. Coash, Attorney at Law, appeared on behalf of the Petitioner herein Maplewood Custom Mill Work. Mr. James F. Hunt, Attorney at Law, from the Berry, Johnston, Sztykiel, Hunt, and McCandless, P.C. appeared on behalf of the Respondent herein the Secura Insurance Company.

During the contest the case hearing on April 20, 2008, the Petitioner offered into the record ten exhibits. The following exhibits from the Petitioner were admitted into the record:

1. Petitioner's Exhibit 1 is a chart of the W-2's issued by Maplewood Custom Mill Work for the year 2004.

2. Petitioner's Exhibit 2 is six pages of W-2's issued by Maplewood Custom Mill Work for 2004.

3. Petitioner's Exhibit 3 is a chart from 2004 of the 1099's issued by Maplewood Custom Mill Work and it is two pages long.

4. Petitioner's Exhibit 4 is fourteen pages of 1099's issued by Maplewood Custom Mill Work, and there are two 1099's to a page.

5. Petitioner's Exhibit 5 is a list of 1099's issued by Maplewood Custom Mill Work for the year 2005 and it is two pages long.

6. Petitioner's Exhibit 6 is fifteen pages of 1099's issued by Maplewood Custom Mill Work in the year 2005. Again, there are two 1099's to a page of fifteen pages.

7. Petitioner's Exhibit 7 is a two page chart showing the W-2's issued by Maplewood Custom Mill Work for the year 2005.

8. Petitioner's Exhibit 8 is W-2's issued by Maplewood Custom Mill Work in 2005 and there are nine pages. There is only one W-2 per page.

9. Petitioner's Exhibit 9 is the declaration page from the Secura and Worker's Compensation Insurance policy issued on June 24, 2004 which was the original premium for the Petitioner's compensation policy before the policy audit. The premium listed in the exhibit is $6, 636.00. The exhibit is 1 page.

10. Petitioner's Exhibit 10 is the declaration sheet from the worker's compensation policy for Petitioner with Respondent after the payroll audit. The declaration sheet is dated June 1, 2006. The exhibit indicates an annual premium after the audit of

$28,260.00. The previous premium paid in accordance with exhibit nine was credited towards the audit premium resulting in additional premium due of $21,804.00 as alleged by the Respondent. Petitioner's Exhibit 10 is one page.

During the contested case hearing on February 20, 2008, the Respondent offered into the record four exhibits. The following exhibits from the Respondent were admitted into the record:

1. Respondent's Exhibit A is a photo electric copy of a photograph taken of petitioner's business.

2. Respondent's Exhibit B is a five page document containing the Worker's Compensation and Employer's Liability Insurance policy issued by the Respondent for the Petitioner's business.

3. Respondent's Exhibit C is a summary of the audit performed by Respondent for the period of June 14, 2004 through June 14, 2005.

4. Respondent's Exhibit D is a three page document which is the premium audit reflecting the difference between the credit advanced premium and the amended co-premium in the amount of $21,804.00

During the February 20, 2008 contested case hearing, Mr. Eric Dietrich testified. Mr. Dietrich is the president of Maplewood Custom Mill Work. Ms. Sherrie Major testified that she is employed by Vista Resources as a premium audit manager. Ms. Major was charged with the premium audit of Maplewood Custom Mill Work. She was the principle or contact person with Maplewood. Her discussions were with Mr. Edgar Dietrich.

At the close of proofs on February 20, 2008, the Petitioner and the Respondent made oral closing arguments.

At the conclusion of the hearing on February 20, 2008, the Judge indicated to the parties off the record that he would leave the evidentiary record open until Monday, March 3, 2008 for any additional filings that the parties deemed appropriate. The evidentiary record did close on March 3, 2008.

ISSUES AND PELICIPAL LAW

The general issue in this matter is whether or not the Respondent's decision to increase the premiums on Petitioner's policy should be affirmed or reversed pursuant to the Insurance Code of 1956, as amended (Code), being MCL 500.100 *et seq.* and or the Worker's Disability Compensation Act of 1969, as amended (Act), being MCL 418.101 *et seq.* The specific Sections of the Code or Act that are relevant to the determination of this matter are: Section 2458 of the code, being MCL 500.2458, Section 161 of the act, being MCL 418.161 and or Section 171 of the act, being MCL 418.171. Those sections state:

> **500.2458 Furnishing information as to rates; hearings for persons aggrieved by rating system; appeal; representation.**
>
> Sec. 2458.
>
> Every rating organization and every insurer which makes its own rates shall, within a reasonable time after receiving written request therefor and upon payment of such reasonable charge as it may make, furnish to any insured affected by a rate made by it, or to the authorized representative of the insured, all pertinent information as to the rate. Every rating organization and every insurer which makes its own rates shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by his or her authorized representative, on his or her written request to review the manner in which the rating system has been applied in connection with the insurance afforded to him or her. If the rating organization or insurer fails to grant or reject the request within 30 days after it is made, the applicant may proceed in the same manner as if his or her application had been rejected. Any party affected by the action of the rating organization or insurer on request may, within 30

days after written notice of the action, appeal to the commissioner, who, after a hearing held upon not less than 10 days' written notice to the appellant and to the rating organization or insurer, may affirm or reverse the action. A person who requests a hearing before the commissioner pursuant to this section may be represented at the hearing by an attorney. A person, other than an individual, that requests a hearing before the commissioner pursuant to this section may also be represented by an officer or employee of that person. An individual who requests a hearing before the commissioner pursuant to this section may also be represented by a relative of the individual.

418.161 "Employee" defined; exclusion from coverage of partner or spouse, child, or parent in employer's family; election by employee to be excluded; notice of election; duration of elected exclusion; § 418.141 inapplicable to certain actions.

Sec. 161.

(1) As used in this act, "employee" means:

(a) A person in the service of the state, a county, city, township, village, or school district, under any appointment, or contract of hire, express or implied, oral or written. A person employed by a contractor who has contracted with a county, city, township, village, school district, or the state, through its representatives, shall not be considered an employee of the state, county, city, township, village, or school district which made the contract, when the contractor is subject to this act.

(b) Nationals of foreign countries employed pursuant to section 102(a)(1) of the mutual educational and cultural exchange act of 1961, Public Law 87-256, 22 U.S.C. 2452, shall not be considered employees under this act.

(c) Police officers, fire fighters, or employees of the police or fire departments, or their dependents, in municipalities or villages of this state providing like benefits, may waive the provisions of this act and accept like benefits that are provided by the municipality or village but shall not be entitled to like benefits from both the municipality or village and this act; however, this waiver shall not prohibit such employees or their dependents from being reimbursed under section 315 for the medical expenses or portion of medical expenses that are not otherwise provided for by the municipality or village. This act shall not be construed as limiting, changing, or repealing any of the provisions of a charter of a municipality or village of this state relating to benefits, compensation, pensions, or retirement independent of this act, provided for employees.

(d) On-call members of a fire department of a county, city, village, or township shall be considered to be employees of the county, city, village, or township, and entitled to all the benefits of this act when personally injured in the performance of duties as on-call members of the fire department whether the on-call member of the fire department is paid or unpaid. On-call members of a fire department of a county, city, village, or township shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the county, village, city, or township for the purpose of calculating the weekly rate of compensation provided under this act except that if the member's average weekly wage was greater than the state average weekly wage at the time of the injury, the member's weekly rate of compensation shall be determined based on the member's average weekly wage.

(e) On-call members of a fire department or an on-call member of a volunteer underwater diving team that contracts with or receives reimbursement from 1 or more counties, cities, villages, or townships shall be entitled to all the benefits of this act when personally injured in the performance of their duties as on-call members of a fire department or as an on-call member of a volunteer underwater diving team whether the on-call member of the fire department or the on-call member of the volunteer underwater diving team is paid or unpaid. On-call members of a fire department shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the fire department for the purpose of calculating the weekly rate of compensation provided under this act except that if the member's average weekly wage was greater than the state average weekly wage at the time of the injury, the member's weekly rate of compensation shall be determined based on the member's average weekly wage. On-call members of a volunteer underwater diving team shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the fire department for the purpose of calculating the weekly rate of compensation provided under this act except that if the member's average weekly wage was greater than the state average weekly wage at the time of the injury, the member's weekly rate of compensation shall be determined based on the member's average weekly wage.

(f) The benefits of this act shall be available to a safety patrol officer who is engaged in traffic regulation and management for and by authority of a county, city, village, or township, whether the officer is paid or unpaid, in the same manner as

benefits are available to on-call members of a fire department under subdivision (d), upon the adoption by the legislative body of the county, city, village, or township of a resolution to that effect. A safety patrol officer or safety patrol force when used in this act includes all persons who volunteer and are registered with a school and assigned to patrol a public thoroughfare used by students of a school.

(g) A volunteer civil defense worker who is a member of the civil defense forces as provided by law and is registered on the permanent roster of the civil defense organization of the state or a political subdivision of the state shall be considered to be an employee of the state or the political subdivision on whose permanent roster the employee is enrolled when engaged in the performance of duty and shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the state or political subdivision for purposes of calculating the weekly rate of compensation provided under this act.

(h) A volunteer licensed under section 20950 or 20952 of the public health code, 1978 PA 368, MCL 333.20950 and 333.20952, who is an on-call member of a life support agency as defined under section 20906 of the public health code, 1978 PA 368, MCL 333.20906, shall be considered to be an employee of the county, city, village, or township and entitled to the benefits of this act when personally injured in the performance of duties as an on-call member of a life support agency whether the on-call member of the life support agency is paid or unpaid. An on-call member of a life support agency shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the county, city, village, or township for purposes of calculating the weekly rate of compensation provided under this act except that if the member's average weekly wage was greater than the state average weekly wage at the time of the injury, the member's weekly rate of compensation shall be determined based on the member's average weekly wage.

(i) A volunteer licensed under section 20950 or 20952 of the public health code, 1978 PA 368, MCL 333.20950 and 333.20952, who is an on-call member of a life support agency as defined under section 20906 of the public health code, 1978 PA 368, MCL 333.20906, that contracts with or receives reimbursement from 1 or more counties, cities, villages, or townships shall be entitled to all the benefits of this act when personally injured in the performance of his or her duties as an on-call member of a life support agency whether the on-call member of the life support agency is paid or unpaid. An on-call

member of a life support agency shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the life support agency for the purpose of calculating the weekly rate of compensation provided under this act except that if the member's average weekly wage was greater than the state average weekly wage at the time of the injury, the member's weekly rate of compensation shall be determined based on the member's average weekly wage.

(j) If a member of an organization recognized by 1 or more counties, cities, villages, or townships within this state as an emergency rescue team is employed by a state, county, city, village, or township within this state as a police officer, fire fighter, emergency medical technician, or ambulance driver and is injured in the normal scope of duties including training, but excluding activation, as a member of the emergency rescue team, he or she shall be considered to be engaged in the performance of his or her normal duties for the state, county, city, village, or township. If the member of the emergency rescue team is not employed by a state, county, city, village, or township within this state as a police officer, fire fighter, emergency medical technician, or ambulance driver, and is injured in the normal scope of duties, including training, as a member of the emergency rescue team, he or she shall be considered to be an employee of the team. For the purpose of securing the payment of compensation under this act, on activation, each member of the team shall be considered to be covered by a policy obtained by the team unless the employer of a member of the team agrees in writing to provide coverage for that member under its policy. Members of an emergency rescue team shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the team for the purpose of calculating the weekly rate of compensation provided under this act except that if the member's average weekly wage was greater than the state average weekly wage at the time of the injury, the member's weekly rate of compensation shall be determined based on the member's average weekly wage. As used in this subdivision, "activation" means a request by the emergency management coordinator appointed pursuant to section 8 or 9 of the emergency management act, 1976 PA 390, MCL 30.408 and 30.409, made of and accepted by an emergency rescue team.

(k) A political subdivision of this state shall not be required to provide compensation insurance for a peace officer of the political subdivision with respect to the protection and compensation provided by 1937 PA 329, MCL 419.101 to 419.104.

(l) Every person in the service of another, under any contract of hire, express or implied, including aliens; a person regularly employed on a full-time basis by his or her spouse having specified hours of employment at a specified rate of pay; working members of partnerships receiving wages from the partnership irrespective of profits; a person insured for whom and to the extent premiums are paid based on wages, earnings, or profits; and minors, who shall be considered the same as and have the same power to contract as adult employees. Any minor under 18 years of age whose employment at the time of injury shall be shown to be illegal, in the absence of fraudulent use of permits or certificates of age in which case only single compensation shall be paid, shall receive compensation double that provided in this act.

(m) Every person engaged in a federally funded training program or work experience program which mandates the provision of appropriate worker's compensation for participants and which is sponsored by the state, a county, city, township, village, or school district, or an incorporated public board or public commission in the state authorized by law to hold property and to sue or be sued generally, or any consortium thereof, shall be considered, for the purposes of this act, to be an employee of the sponsor and entitled to the benefits of this act. The sponsor shall be responsible for the provision of worker's compensation and shall secure the payment of compensation by a method permitted under section 611. If a sponsor contracts with a public or private organization to operate a program, the sponsor may require the organization to secure the payment of compensation by a method permitted under section 611.

(n) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act.

(2) A policy or contract of worker's compensation insurance, by endorsement, may exclude coverage as to any 1 or more named partners or the spouse, child, or parent in the employer's family. A person excluded pursuant to this subsection shall not be subject to this act and shall not be considered an employee for the purposes of section 115.

(3) An employee who is subject to this act, including an employee covered pursuant to section 121, who is an employee of a limited liability company of not more than 10

members and who is also a manager and member, as defined in section 102 of the Michigan limited liability company act, 1993 PA 23, MCL 450.4102, and who owns at least a 10% interest in that limited liability company, with the consent of the limited liability company as approved by a majority vote of the members, or if the limited liability company has more than 1 manager, all of the managers who are also members, except as otherwise provided in an operating agreement, may elect to be individually excluded from this act by giving a notice of the election in writing to the carrier with the consent of the limited liability company endorsed on the notice. The exclusion shall remain in effect until revoked by the employee by giving notice in writing to the carrier. While the exclusion is in effect, section 141 shall not apply to any action brought by the employee against the limited liability company.

(4) An employee who is subject to this act, including an employee covered pursuant to section 121, who is an employee of a corporation which has not more than 10 stockholders and who is also an officer and stockholder who owns at least 10% of the stock of that corporation, with the consent of the corporation as approved by its board of directors, may elect to be individually excluded from this act by giving a notice of the election in writing to the carrier with the consent of the corporation endorsed on the notice. The exclusion shall remain in effect until revoked by the employee by giving a notice in writing to the carrier. While the exclusion is in effect, section 141 shall not apply to any action brought by the employee against the corporation.

(5) If the persons to be excluded from coverage under this act pursuant to subsections (2) to (4) comprise all of the employees of the employer, those persons may elect to be excluded from being considered employees under this act by submitting written notice of that election to the director upon a form prescribed by the director. The exclusion shall remain in effect until revoked by giving written notice to the director.

418.171 Employer contracting with person not subject to act; liability; applicability of section to principal and contractor; willful circumvention of provisions; employer as contractor; reimbursement agreement.

Sec. 171.

(1) If any employer subject to the provisions of this act, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, who is not subject to this act or who has not complied with the provisions

of section 611, and who does not become subject to this act or comply with the provisions of section 611 prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal. If compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the person under the employer by whom he or she is immediately employed. A contractor shall be deemed to include subcontractors in all cases where the principal gives permission that the work or any part thereof be performed under subcontract.

(2) If the principal is liable to pay compensation under this section, he or she shall be entitled to be indemnified by the contractor or subcontractor. The employee shall not be entitled to recover at common law against the contractor for any damages arising from such injury if he or she takes compensation from such principal. The principal, in case he or she pays compensation to the employee of such contractor, may recover the amount so paid in an action against such contractor.

(3) This section shall apply to a principal and contractor only if the contractor engages persons to work other than persons who would not be considered employees under section 161(1)(d).

(4) Principals willfully acting to circumvent the provisions of this section or section 611 by using coercion, intimidation, deceit, or other means to encourage persons who would otherwise be considered employees within the meaning of this act to pose as contractors for the purpose of evading this section or the requirements of section 611 shall be liable subject to the provisions of section 641. Nothing in this section shall be construed to prohibit an employee from becoming a contractor subject to the provisions of section 151. A principal may demand that the contractor enter into a written agreement with the principal agreeing to reimburse the principal for any loss incurred under this section due to a claim filed pursuant to this act for compensation and other benefits.

DISCUSSION

In this matter the Petitioner argues that the individuals declared to be "employees" of the Petitioner in the audit were in fact "independent contractors" and not subject to the Act. Thus, the audit should be reversed with a finding that the Petitioner is not subject to additional premiums. In this matter the Petitioner contends that the independent contractors are installers for the Petitioner but not employees of the Petitioner. It is the Petitioner's position that the "independent contractors" are not controlled or managed by the company. There are no fringe benefits paid, and the independent contractors are paid by the "job". In this matter the Petitioner indicates that the installers are paid based on the cabinets that are installed and the number of square feet of molding installed.

The Respondent argues that in addition to reviewing Section 161 of the Act, Section 171 must also be interpreted in combination to reach a legal conclusion. It is the Respondent's position that at a minimum the individuals in dispute were "statutory employees" of the Petitioner, that is a person who is controlled at least fifty one percent of the time by the employer and thus subject to the act. It is the Respondent's contention that if the individuals are employees of the Petitioner then clearly they should have been included in the calculations for coverage.

Mr. Dietrich testified that the individuals who were included in the audit were not employees but independent contractors. These individuals became independent contractors of the Petitioner's corporation through personal referral or advertising.

Mr. Dietrich stated that his corporation did not provide tools to the installers, did not give them materials other than the cabinets, counter tops, and flooring that they would be installing as independent contractors. Mr. Dietrich stated that the installers

were paid by the installation, i.e., so much to install a foot of molding and so much to finish a square foot of dry wall, it was per task bases. Not a salary or hourly rate.

Mr. Dietrich also testified that when an installer was called about performing a job, he or she did not have to take that job. Their schedules were arranged between them and the homeowners not the Petitioner and the installers.

Mr. Dietrich indicated that the installers did not "punch a clock" and their hours were not recorded by his company. Maplewood did not provide the installers with any fringe benefits, no health insurance, no vacation pay, no sick time, and no other benefits. Finally, Mr. Dietrich stated that the installers worked for other companies also installing materials and cabinets.

Mr. Dietrich testified that installers were paid on the basis of a project. They would have an amount that they would expect for completing the project and then they could as necessary take draws towards that line and be able to provide materials for the project until completion when they receive the balance of their draw.

Mr. Dietrich stated that his company never provided transportation to the installers. Mr. Dietrich indicated that none of the installers received mail at the company's headquarters and they were paid in terms of being an independent contractor. They received a 1099 as such. Installers maintained their own separate business.

Mr. Dietrich stated that when a homeowner would ask about worker's compensation coverage, they would be informed that a certificate of insurance would be provided showing that the individual installer had his or her own insurance.

Mr. Dietrich testified that exhibit 3 is a list of individuals who received 1099's from Maplewood in 2004. For example, [redacted] received $9,000.00 from the Petitioner as an installer. He owned and operated his own business. [redacted]

earned $4,895.00 in 2004 as an independent kitchen installer. Mr. Dietrich indicated that independent contractors who received 1099's also worked for other companies.

Mr. Dietrich stated that Exhibit 7 shows the people who are actual employees of Maplewood Custom Mill Work, Inc. These individuals received W-2 forms.

Mr. Dietrich testified that he knew the company was being audited by the insurance carrier. He knew it was a payroll audit. At some point he discovered the premium would be increased. Mr. Dietrich stated that during the audit period, there were no claims filed for worker's compensation coverage by the Petitioner.

During cross examination Mr. Dietrich testified that he became president of the corporation in 2004, that the shares of the corporation are held by the Dietrich Family Trust, and that Edgar Dietrich is his father. Mr. Dietrich stated that his father was not involved in the day to day operation of the corporation, but that he advised him on different matters including the audit and that his father may have been involved with the audit team during the audit.

Mr. Dietrich explained that Petitioner exhibit nine explains what the original premium charge was of $6, 636.00 and that exhibit ten shows the declaration page after the audit with a premium of $28,360.00. He also stated that there were no claims during the year in questioned.

Mr. Dietrich identified Respondent exhibit A as a photo electric copy of a picture of the Petitioner's business.

Mr. Dietrich stated that the picture contained in Respondent's Exhibit A establishes that the company offices advertised the fact that they have professional installation for the product that the company sells. Mr. Dietrich also acknowledges that the

products are delivered to the work site by the manufacture, by trucks owned by the company and sometimes by the contractor's vehicles. There are times that Mr. Dietrich helps the installers unload the products from the trucks.

Mr. Dietrich admits that he does not do a 1099 for any helpers that work for the installation contractor. He pays only the contractor and the 1099 goes only to a contractor so anyone who is a helper for the contractor is paid by the contractor and not paid by the Petitioner.

During his testimony Mr. Dietrich stated that it is up to the installers to decide how many people they need to a project. The people are not assigned by the Petitioner to do an installation. The installers can employ as many people as they feel is necessary to do the job. Mr. Dietrich also indicates that he has an agreement with the installers as to what they are going to be paid for the work and that it is up to them to get the work completed. When the work is completed they are paid.

When customers ask Mr. Dietrich if the workers are covered by Worker's Compensation Insurance he tells them that they are. He indicates that he can have a certificate showing that they are covered for worker's compensation to any of the homeowners when necessary. He then gets copies of the certificates from the independent contractors i.e. the installers. However, when asked by the Respondent's attorney to show a proof of insurance for one of the installers Mr. Dietrich acknowledged that he did not have proof of insurance at this time for several "installers". He did state that one of the installers was a truck driver, a [redacted]. He further admitted that he did not have proof that [redacted] had worker's compensation coverage. Mr. Dietrich stated, "I have no knowledge whether he was covered or not". He also admits that he did not know if [redacted] helpers were covered by a worker's compensation policy.

While examining Respondent exhibit B the worker's compensation and employer's liability policy Mr. Dietrich admitted that page five subparagraph E "final premium" clearly indicates that the information pages and schedules for the policy are an estimate based on the proper classification and rates that should be applied to the business and work covered by the policy. See Respondent exhibit B.

In addition, subparagraph G "audit" on page five of exhibit B states that information developed by an audit will be used to determine the final premium. See page (p) 5 of Respondent exhibit D subparagraph G entitled "Audit".

Mr. Dietrich acknowledges that the fact the insurance company did an audit of his business at the end of the policy period, made sense in light of the fact the original agreement stated that the final premium would be determined after an audit. He acknowledges and admits this is the situation. He further testified it was his responsibility to classify independent contractors and classify employers for purposes of the worker's compensation coverage.

Mr. Dietrich believed that there was a mistake made by his bookkeeper classifying independent contractors, subcontractors and employees. He's not sure all the exact specifics of the mistake and how the mistake should have been corrected He further admits that based on all the materials in his possession he's not sure how many of the independent contractors had worker's compensation insurance he simply does not know. He also admitts that he did not secure affidavits for many of the installers who received 1099's to determine if they had coverage. He has no documentation on this issue.

As indicated above Ms. Majors testified on behalf of the Respondent. She is an employee of Vista Resources serving as a premium audit manager. She has worked with the company for approximately two years and has been in this type of work for nine years. Before working for Vista Resources, she worked for the Amerisure Insurance Company and Liberty Mutual Insurance Company. She has a Bachelor's Degree from Central Michigan University in Business, majoring in Accounting; she received her Master's Degree from Walsh College. She also previously worked for a certified public accounting firm in her capacity as a premium auditor. Her background and experience is in audits, financial audits, audits for investment and retirement funds, and insurance carriers. She continues her education by attending seminars and workshops put on by insurance industry representatives as well as representatives from regulatory bodies. These conferences expanded her education beyond her two degrees.

Ms. Major testified that she was in charge of the audit of the Maplewood Work company. Her contact with the company was Mr. Edgar Dietrich. The audit was a payroll audit in which an audit form was sent out requesting payroll information including "subcontractors". Once the material is returned then a comparison is made between the estimated premium with data on employees and subcontractors or independent contractors. Once the audit is completed, the conclusions are turned over to the insurance carrier. The insurance carrier then determines if there are any additional exposures or risks which need to be determined in order to calculate the final premium or adjust the estimated premium.

Ms. Major was in contact with Mr. Edgar Dietrich, and received all the relevant information from him. Each classification code which represents the industry would be compared once the information was provided by the Petitioner. Rates are then determined based on a percentage of claims versus $100.00 of payroll.

Ms. Major brought to Mr. Edgar Dietrich's attention the fact that the "independent contractors" or installers were such a large amount of the total payroll or gross of the company that it appeared that these individuals were in fact employees or statutory employees of the company. Mr. Edgar Dietrich explained that the cabinets, etc. were either manufactured and then delivered to the Petitioner or made by the Petitioner. Petitioner then referred the installation to the installers. Most customers take out a loan from the Petitioner to pay for the work and that ultimately the installers are paid through loan money. Mr. Edgar Dietrich indicated that the installers were not employees of the Petitioner because the loan money was paying for their services. However, Mr. Edgar Dietrich admits that the money came from Maplewood not the loan company to pay the installers.

Ms. Major explained to Mr. Edgar Dietrich that in order for the installers to be subcontractors or independent contractors of Maplewood, they would have to have certificates of insurance as an independent contractor and an independent contractor exclusion form which had to be filled out. This material has never been provided to the audit firm or the Respondent.

Ms. Major testified that if the certificate of insurance and exclusion forms had been filled out then the installers could have been excluded from the class of employees to be insured by the Respondent. If the installers were excluded from the employee group then the estimated premium would have been correct, however because they were not excluded from the group then the estimated premium was too low for the risk incurred by the Respondent.

Mr. Edgar Dietrich was supplied with the appropriate forms to be filled out by the installers. The content of the forms were explained to Mr. Edgar Dietrich but the information was never provided by way of forms, affidavits, or certificates of insurance showing that the installers had their own liability and worker's compensation insurance coverage.

During cross examination, Ms. Major explained that all Worker's Compensation Insurance is based on the amount of payroll. This is how the premium rates are determined. Due to the fact that companies can not predict their exact payroll for a given insurance year, there must be an audit at the end of the year to determine the appropriateness of the premium that was charged at an estimate at the beginning of the insurance year. Ms. Major testified this is standard practice.

FINDINGS OF FACTS

Based upon the record as a whole, including the pleadings, exhibits and testimony of the witnesses, the Following Findings are established:

1. The Petitioner was insured by the Respondent for liability and worker's compensation insurance beginning on June 14, 2004 and ending on June 14, 2005.

2. Following the completion of the insurance year, an audit of the Petitioner's payroll was conducted by Vista Resources on behalf of the Respondent insurer, the Secura Insurance Company.

3. The original estimated premium for the Petitioner beginning on June 14, 2004 through June 14, 2005 was $6,636.00.

4. Following the audit for the Respondent by the Vista Resources Corporation, the premium was amended to cover the risks including the installers. The premium was adjusted to $28,440.00 for the year in dispute.

5. The Petitioner presented little or no proofs that the installers were in fact independent contractors. Other than W-2 records or 1099 forms, no other evidence was offered by the Petitioner to establish that the installers were independent contractors or subcontractors of the Petitioner's company.

6. The Petitioner was aware that the original charge of the $6,636.00 was an estimated charge or premium for the coverage and that an audit would be conducted at the end of the coverage year to determine the final premium.

7. The Petitioner failed to present sufficient proofs to challenge the results of the Respondent's audit.

CONCLUSIONS OF LAW

The principles that govern the judicial proceedings also apply to Administrative Hearings. 8 Callaghan's Michigan Pleadings and Practice (2d ed), Section 60.48, page 230. The initial burden of proof of persuasion is on the party seeking relief. In this case, the Petitioner challenges the audit. Thus it is the Petitioner's duty in this matter to establish that the audit should be reversed. Martucci v Detroit Commissioner of Police, 322 Mich 270 (1948). The Petitioner request relief in this matter to reverse the conclusions of the audit, the Petitioner must go forward to establish that their position is correct and that the Respondent's position is incorrect. Americway Service Corporation v Commissioner of Insurance, 113 Mich 423 (1982). The same burden of persuasion or proof applies in

proceeding before an Administrative Tribunal as in a civil court. Aquilina v General Motors Corporation, 403 Mich 206 (1978).

Due process requires that the evidentiary standard upon which an administrative agency's decision is based be made on findings of fact that are ascertainable. Dation v Ford Motor Company, 314 Mich 152 (1946). An administrative agency may consider evidence of a type commonly relied upon by a reasonably prudent person in the conduct of their affairs subject to the rules of evidence as applied in a non-jury civil case. Spratt v Department of Social Services, 169 Mich 693 (1988) and Section 75 of the Administrative Procedures Act, being MCL 24.275.

The United States Supreme Court has upheld the use of a "preponderant to the evidence" standard for administrative hearings. Steadman v Securities and Exchange Commission, 450 U.S. 91 (1981). In this matter, a preponderant of the evidence is necessary for the Petitioner to establish that the audit of the Respondent should be reversed. Proof by a preponderant of evidence requires that the Judge believed that the evidence supporting the existence of a contested fact outweighs the evidence supporting its non-existence. Martucci, *supra*. Therefore, the Petitioner must establish in this case by greater weight of the evidence that its position is correct. Krisher v Duff, 331 Mich 699 (1951). Thus, the Petitioner has the burden of proof in this matter it must establish its position on the record as a whole by preponderance of the evidence. Stone v Earp, 331 Mich 606 (1951).

MCL 418.161 defines "employee". In pertinent part:

> Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does

> not maintain a separate business, does not hold himself or herself out to or render services to the public, and is not an employer subject to this act. (Section 161(n) of the Act).

If the Petitioner had established that the installers maintained a separate business, held themselves out to, and rendered services to the public other than to the Petitioner, then they would not be an employee under the Act. Other than the W-2 forms and 1099 forms, the Petitioner offered no evidence to support the conclusion that the installers were independent contractors.

MCL 418.171 states in pertinent part:

> Sec. 171.
>
> (1) If any employer subject to the provisions of this act, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, who is not subject to this act or who has not complied with the provisions of section 611, and who does not become subject to this act or comply with the provisions of section 611 prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal. If compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the person under the employer by whom he or she is immediately employed.

Thus, Section 171 of the Act creates a "statutory employee". The Petitioner has failed to present sufficient proofs or evidence to establish that the installers are independent contractors. However, even if such proof had been sufficient, it still does not establish that the Petitioner is free from a liability under the Act pursuant to Section 171.

Clearly, this record establishes that the installers are "statutory employees". They receive their work assignments from the Petitioner and they receive their income from the Petitioner. The mere fact that they received either a 1099 form or a W-2 form is not sufficient to establish that they are totally independent from the Petitioner business. The exhibits establish, employees were given W-2 forms and 1099 forms. Mr. Eric Dietrich acknowledged this fact during his testimony and called it an "accounting error".

In any event, the record does not establish by a preponderance of evidence that the installers are independent contractors.

Section 2458 of the Code MCL 500.2458 states in pertinent part:

> Any party affected by the action of a raiding organization or insurer on request may, within 30 days after rating notice action, appeal to the commissioner who, after a hearing held upon not less than 10 days written notice to the appellant and to the rating organization or insurer, may affirm underlying at would or reversed the action.

It is clear that Section 2458 of the Code requires a determination that the audit and final premiums as established by the Respondent's audit be affirmed or reversed. The statute leaves no discretion in recalculating the premiums.

Since the record in this matter does not contain evidence by a preponderance to establish that the installers are independent of the Petitioner, the action of the Respondent's company must be affirmed.

ORDER

NOW THEREFORE, IT IS ORDERED that:

1. The Petitioner has failed to establish on this record a whole by a preponderance of the evidence that the installers are independent contractors and thus not subject to the Act.

2. The evidence does not establish that the final premium as calculated by the Respondent should be reversed.

3. It is recommended that the commissioner adopt this Proposal for Decision and affirm the decision of the Respondent in this matter.

EXCEPTIONS

The parties may file exceptions to this Proposal for Decision within 20 days after the Proposal for Decision is issued and entered. The opposing party may file a response within 10 days after the exceptions are filed. Any such exceptions or responses shall be filed with the Office of Financial and Insurance Services, 611 W. Ottawa St., 3rd Floor, P.O. Box 30220, Lansing, MI Attention: Dawn Kobus.

Edward F. Rodgers II
Administrative Law Judge